

Senate Bill 270

By: Senators Williams of the 19th, Whitehead, Sr. of the 24th and Kemp of the 46th

AS PASSED

AN ACT

To amend Article 4 of Chapter 2 of Title 32 of the Official Code of Georgia Annotated, relating to the general contracting powers of the Department of Transportation, so as to permit the acceptance of solicited as well as unsolicited proposals for public-private initiatives; to allow for the disclosure of nonproprietary matters from the unsolicited and solicited proposals in order to encourage competition; to provide for a payment and performance bond sufficient to protect the interest of the public; to extend the time for submission of competing proposals; to amend Part 1 of Article 1 of Chapter 10 of Title 32 of the Official Code of Georgia Annotated, relating to the Georgia Highway Authority generally, to provide for additional definitions and powers of the authority; to provide for related matters; to provide an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 4 of Chapter 2 of Title 32 of the Official Code of Georgia Annotated, relating to the general contracting powers of the Department of Transportation, is amended by striking Code Section 32-2-78, relating to the definitions governing public-private initiatives, and inserting in its place the following:

32-2-78.

As used in this chapter, the term:

- (1) 'Department' means the Georgia Department of Transportation.
- (2) 'Evaluation Committee' means the one or more committees established for the purpose of evaluating and making a recommendation with respect to unsolicited proposals, solicited proposals, competing proposals, or comparable proposals as set forth in this chapter. The Evaluation Committee shall consist of a designee of the Governor, a designee with a background in finance to be named by the Governor, the commissioner of the Department of Transportation, the director of the State Road and Tollway Authority, and the director of the Georgia Regional Transportation Authority. The Evaluation Committee shall employ such experts as needed in the performance of its

duties and charge the expenses incurred by it to such funds made available to the department for such purposes.

(3) 'Letter of intent to negotiate' means the written statement of mutual intent by the department and the proposer for a public-private initiative to develop and implement a course of negotiation, within a substantive framework, which if successfully completed could lead to a binding contractual agreement to accomplish a proposed transportation system project.

(4) 'Private contribution' means resources supplied by a private entity to accomplish all or any part of the work on a transportation system project, including funds, financing, income, revenue, cost sharing, technology, staff, materials, equipment, expertise, data, or engineering, construction, or maintenance services, or other items of value. To the extent that this definition may conflict with any federal law or regulation, for any project utilizing federal funds, the federal definition shall supersede this paragraph.

(5) 'Public-private initiative' means a nontraditional arrangement between the department and one or more private or public entities that provides for:

(A) Acceptance of a private contribution to a transportation system project or service in exchange for a public benefit concerning that project or service;

(B) Sharing of resources and the means of providing transportation system projects or services; or

(C) Cooperation in researching, developing, and implementing transportation system projects or services.

(6) 'Solicited proposal' means a written proposal for a public-private initiative that is submitted by a private entity for the purpose of entering into an agreement with the department concerning a transportation system project in response to a formal solicitation or notification issued by the department. A solicited proposal may be made as a competing proposal or comparable proposal to an unsolicited proposal.

(7) 'Transportation system' means the state transportation infrastructure and related systems, including highways, roadways and associated rights of way, bridges, tunnels, overpasses, ferries, airports, port facilities, vehicle parking facilities, park-and-ride lots, transit systems, transportation management systems, intelligent vehicle highway systems, or similar facilities used for the transportation of persons or goods, together with any other property, buildings, structures, parking areas, appurtenances, and facilities needed to operate such system, including any major transportation facility as defined by paragraph (3) of subsection (a) of Code Section 32-2-3, and any other facility for other transportation purposes as defined by paragraph (18) of Code Section 32-1-3.

(8) 'Unsolicited proposal' means a written proposal for a public-private initiative that is submitted by a private entity for the purpose of entering into an agreement with the department concerning a transportation system project but that is not in response to a formal solicitation or request issued by the department.

SECTION 2.

Said article is further amended by striking Code Section 32-2-79, relating to requirements for unsolicited proposals for public-private initiatives, and inserting in its place the following:

32-2-79.

- (a) The department may solicit upon prior notice to the Governor, receive, consider, evaluate, and accept an unsolicited or solicited proposal for a public-private initiative only if the proposal complies with all of the requirements of this Code section.
- (b) The department may consider an unsolicited proposal only if the proposal:
 - (1) Is unique and innovative in comparison with and is not substantially similar to other transportation system projects already in the state transportation improvement program within the department or, if it is similar to a project in the state transportation improvement program, that such project has not been fully funded by the department or any other entity as of the date the proposal is submitted. Unique or innovative features which may be considered by the department in evaluating such a proposal may include but not be limited to unique or innovative financing, construction, design, or other components as compared with other projects or as otherwise defined by department rules or regulations;
 - (2) Is independently originated and developed by the proposer; and
 - (3) Includes or is accompanied by:
 - (A) Such detail and information as the department may require by rule or regulation to assist in its evaluation of the proposal and to determine if the proposal benefits the public. Such information shall include a list of any proprietary information included in the proposal which the proposer considers protected trade secrets or other information exempted from disclosure under Code Section 50-18-70, et seq., except that the information shall also include an executive summary which at a minimum shall summarize the proposed transportation facility or facilities, identify their proposed location, and provide any other additional information that may be required by the rules

and regulations of the department. Such executive summary shall be subject to immediate disclosure to other interested competing proposers and the public;

(B) An itemized, auditable listing of the costs associated with the development of the proposal; and

(C) Such fees as may be required by the rules and regulations of the department for submission of such proposals.

(c) Paragraph (1) of subsection (b) of this Code section shall not be deemed to prohibit the department from encouraging the submission of unsolicited or solicited proposals that are well-developed and consistent with the department's general policy priorities by providing written or oral information to any person regarding the policy priorities or the requirements and procedures for submitting an unsolicited or solicited proposal.

(d) If the unsolicited proposal does not comply with the requirements of subsection (b) of this Code section, the department shall return the proposal without further action. In taking such action, the department shall not disclose either the originality of the research or any proprietary information associated with the proposal to any other person or entity. If the unsolicited proposal complies with all the requirements of subsection (b) of this Code section, the department may further evaluate the proposal pursuant to this Code section.

(e) Within 30 days of receipt of an unsolicited proposal that meets the requirements of subsection (b) of this Code section, the department shall provide public notice of the proposed project. This notice shall:

(1) Be published in a newspaper of general circulation which is a legal organ and upon such electronic website providing for general public access as the department may develop for such purpose or in the same manner as publications providing notice as described in Code Section 32-2-65;

(2) Be provided to any person or entity that expresses in writing to the department an interest in the subject matter of the proposal and to any member of the General Assembly whose House or Senate district would be affected by such proposal;

(3) Outline the general nature and scope of the unsolicited proposal, including the location of the transportation system project and the work to be performed on the project; and

(4) Specify the address to which any comparable proposal must be submitted.

(f) Any person or entity who elects to submit a competing proposal for the proposed qualifying project to the department shall submit a written letter of intent to do so by no later than 45 days after the department's initial publication of the notice accompanied by any fee that the department shall prescribe by guideline, rule, or regulation. Any letter of

intent received by the department after the expiration of the 45 day period or without any fee required by the department shall not be valid, and any competing proposal submitted thereafter by a person or entity who has not submitted a timely letter of intent shall not be considered by the department and shall be returned to the person or entity who did not submit a letter of intent by the deadline. For those persons or entities who elect to submit a competing proposal and submit a timely letter of intent with the department, any such competing proposal shall be submitted to the department by no later than 135 days after the department's initial publication of the notice required by this Code section. Only those competing, compliant proposals submitted by such deadline shall be considered by the department.

(g) Upon receipt of a proposal properly submitted in response to the notice described in subsection (e) of this Code section which fully meets the requirements of subsection (b) of this Code section, the department shall:

- (1) Determine, in its discretion, if any submitted proposal is comparable in nature and scope to the original proposal and whether it warrants further evaluation;
- (2) Evaluate the original proposal and any comparable proposal and make a recommendation to the Evaluation Committee on whether to move forward with a letter of intent to negotiate; and
- (3) Conduct good faith discussions and, if necessary, negotiations concerning each qualified proposal.

(h) The department shall base its evaluation of the original proposal or comparable proposals on the following factors:

- (1) Unique and innovative methods, approaches, or concepts demonstrated by the proposal;
- (2) Scientific, technical, or socioeconomic merits of the proposal;
- (3) Potential contribution of the proposal to the department's mission;
- (4) Capabilities, related experience, facilities, or techniques of the proposer as described in the proposal or unique combinations of these qualities that are integral factors for achieving the proposal objectives;
- (5) Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel who are critical in achieving the proposal objectives; and
- (6) Any other factors appropriate to a particular proposal.

(i) Once the department has concluded its evaluation of the unsolicited proposal and any comparable proposals or a solicited proposal where applicable, the department shall transmit its findings and research to the Evaluation Committee for further review. Once

the Evaluation Committee has concluded its review and makes its recommendation to the department, the department may execute a letter of intent to negotiate with the entity submitting the most desirable proposal as determined by the department's evaluation process. At least two weeks prior to approval of any project, the department shall present to the Governor and the House and Senate transportation committees a report with respect to the proposed letter of intent to negotiate. Such letter of intent to negotiate shall indicate the department's willingness to undertake a public-private initiative if, after public comment:

- (1) The department determines that the project is financially feasible and in the public interest; and
 - (2) The department and the proposer can arrive at agreeable terms and conditions, including price of the project.
- (j) The department may execute a letter of intent to negotiate relating to an unsolicited proposal or conforming comparable proposal or a solicited proposal only if:
- (1) The proposal receives a favorable evaluation by the department and the Evaluation Committee;
 - (2) The department makes a written determination based on facts and circumstances that the proposal is an acceptable basis for an agreement to obtain services from the entity making the proposal; and
 - (3) The specific letter of intent to negotiate is specifically approved by affirmative vote of the State Transportation Board.
- (k) Once the letter of intent to negotiate is signed by the parties, prior to final contracting for any public-private initiative from the unsolicited or conforming comparable proposal or a solicited proposal, the department:
- (1) Should provide public notice that the department will receive public comment with respect to such proposal. The notice shall:
 - (A) Be published in a newspaper of general circulation and which is a legal organ, and upon such electronic website providing for general public access as the department may develop for such specific purpose, or in the same manner as publications providing notice as described in Code Section 32-2-65, or both, allowing at least 14 days and no more than 45 days for public comment to be submitted for consideration;
 - (B) Be provided to any person or entity that expresses in writing to the department an interest in the subject matter of the proposal;
 - (C) Outline the general nature and scope of the proposal, including the location of the transportation system project and the work to be performed on the project; and

- (D) Specify the address to which any public comment or requests for an executive summary must be submitted; and
- (2) In its discretion, may provide additional opportunity for public comment at a public meeting or meetings. In such event, notice of such meetings shall be provided in the same manner as described in paragraph (1) of this subsection.
- (l) In taking the actions required by subsections (e) and (k) of this Code section, the department shall not disclose either the originality of the research or any proprietary information associated with the proposal as listed by the proposer required by paragraph (3) of subsection (b) of this Code section.
- (m) Except as provided under subparagraph (b)(3)(A) of this Code section, the provisions of Code Sections 50-14-1 and 50-18-70 to the contrary notwithstanding, no proposal shall become a 'public record' nor be subject to disclosure as such until the unsolicited proposal, any comparable proposals, or any solicited proposals have been received and any competitive interviews specified in the solicitation process have been completed. At all times thereafter, the department shall not disclose trade secret or proprietary information, or both, specifically designated by the proposer as required by paragraph (3) of subsection (b) of this Code section which meets the definition of a trade secret under Code Section 50-18-70, et seq. Subject to the foregoing, all proposals submitted to the department shall become the property of the department and are subject to the Georgia Open Records Act. Proposers should familiarize themselves with the provisions of the Act to ensure that all documents identified as confidential will not be subject to disclosure under the Open Records Act; provided, however, that the department in consultation with the Department of Law shall make the final determination of whether or not the requested materials are exempt from disclosure. In the event that the department elects to disclose the requested material, it shall attempt to provide the proposer advance notice of its intent to disclose.
- (n) The power of eminent domain shall not be delegated to any private entity under any public-private initiative commenced or proposed pursuant to this chapter.
- (o) The department or the department's designee has the authority to make the determination and take the actions required by this Code section.
- (p) If the department rejects or declines to accept an unsolicited proposal, but within a period of two years following the submission of such proposal the department contracts for a substantially similar project, the department shall reimburse the proposer of the unsolicited proposal for the auditable costs associated with the preparation and development of the proposal upon a request for reimbursement to the department. This

provision shall not apply if the department accepts a conforming comparable proposal through the procedures outlined in subsections (f) and (g) of this Code section.

SECTION 3.

Said article is further amended by striking Code Section 32-2-80, relating to authority to contract with proposer for public-private initiative, and inserting in its place the following:

32-2-80.

(a) If the department follows the evaluation criteria set forth in Code Section 32-2-79 and if an unsolicited or solicited proposal contains all the information required by that Code section and the proposal is accepted by the department as demonstrated by the execution of a letter of intent to negotiate, upon completion of the public comment period, the department shall have the authority to contract with the proposer for a public-private initiative based upon the proposal without subjecting such contract to public bid as required by Code Section 32-2-64, 32-10-68, or 50-5-72. Such contracts shall be in compliance with all other applicable federal and state laws, including, but not limited to, Code Sections 13-10-40, 13-10-60, and 32-2-70, and each specific contract shall be specifically approved by affirmative vote of the State Transportation Board and concurrence by the Governor.

(b) Any agreement entered into pursuant to this article may authorize funding to include tolls, fares, or other user fees and tax increments for use of the transportation facility that is the subject of the proposal. The department may take any action to obtain federal, state, or local assistance for a qualifying project that serves the public purpose of this chapter and may enter into any contracts required to receive such assistance. Any funds received from the state or federal government or any agency or instrumentality thereof shall be subject to appropriation as provided by the Constitution and laws of this state. The department may determine that it serves the public purpose of this chapter for all or any portion of the costs of a qualifying project to be paid, directly or indirectly, from the proceeds of a grant or loan made by the federal, state, or local government or any instrumentality thereof, including, but not limited to, the State Road and Tollway Authority and the Georgia Highway Authority. The department may agree to make grants or loans to the operator from time to time from amounts received from the federal, state, or local government or any agency or instrumentality, including, but not limited to, the State Road and Tollway Authority and the Georgia Highway Authority.

(c) The department, in its sole discretion, may reject any unsolicited or solicited proposal at any time until a contract is signed with the entity submitting the proposal. In the event

that an unsolicited proposal is rejected but the department subsequently proceeds with all or part of such proposal within a period of two years, the entity submitting the proposal shall be entitled to reimbursement of the costs of developing the unsolicited proposal as indicated in subsection (p) of Code Section 32-2-79; provided, however, that the department shall not be responsible for reimbursement of the costs of developing a solicited proposal.

SECTION 4.

Part 1 of Article 1 of Chapter 10 of Title 32 of the Official Code of Georgia Annotated, relating to the Georgia Highway Authority generally, is amended by striking paragraph (10) of Code Section 32-10-1, relating to the definitions governing the Georgia Highway Authority, and inserting in its place the following:

(10) 'Project' means:

- (A) A continuous length or stretch of state road, including bridges thereon, as to which the authority has undertaken or agreed to undertake any action permitted by the terms of this article or as to which any such action has been completed by the authority;
- (B) A continuous length or stretch of county road, including bridges thereon, as to which the authority has undertaken or agreed to undertake any action permitted by the terms of this article or as to which any such action has been completed by the authority;
- (C) A continuous length or stretch of urban road, including bridges thereon, as to which the authority has undertaken or agreed to undertake any action permitted by the terms of this article or as to which any such action has been completed by the authority;
- (D) One or more bridges, as defined in paragraph (5) of this Code section, together with the approaches thereto, as defined in paragraph (1) of this Code section; and
- (E) A project undertaken pursuant to a public-private initiative as authorized pursuant to Code Section 32-2-78.

SECTION 5.

Said part is further amended by striking paragraphs (10) and (11) of Code Section 32-10-4, relating to powers of the Georgia Highway Authority generally, and inserting in their place the following:

- (10) To do and perform all things necessary or convenient to carry out the powers conferred upon the authority by this article;

(11) To prescribe rules and regulations as approved by the department for the operation of each project constructed under this article, including rules and regulations to ensure maximum use of each such project; and

(12) To incorporate one or more nonprofit corporations as subsidiary corporations of the authority for the purpose of carrying out any of the powers of the authority and to accomplish any of the purposes of the authority. Any such subsidiary corporation shall be a nonprofit corporation, a body corporate and politic, and an instrumentality and public corporation of the state and shall exercise essential governmental functions. Any subsidiary corporations created pursuant to this power shall be created pursuant to Chapter 3 of Title 14, the 'Georgia Nonprofit Corporation Code,' and shall be filed with the Secretary of State, who shall be authorized to accept such filings. The commissioner and two individuals appointed by the members of the authority shall constitute the members of and shall serve as directors of any subsidiary corporation, and such appointment shall not constitute a conflict of interest, provided that the provisions of subsection (a) of Code Section 45-10-23 or any other law shall not prevent full-time employees of the authority or the Department of Transportation from serving as members of the governing board of such subsidiary corporation. Upon dissolution of any subsidiary corporation of the authority, any assets shall revert to the authority or to any successor to the authority or, failing such succession, to the state, provided that any toll collection or other tollway operations remain under the authority of the State Road and Tollway Authority. The authority shall not be liable for the debts, obligations, or bonds of any subsidiary corporation or for the actions or omissions to act of any subsidiary corporation unless the authority in writing expressly so consents.

SECTION 6.

This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

SECTION 7.

All laws and parts of laws in conflict with this Act are repealed.